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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, et al., Defendants, TOHONO O'ODHAM NATION, Intervening Defendant.	Case No. CV10-1993-PHX DGC Case No. CV10-2017-PHX DGC (consolidated action) Case No. CV10-2138-PHX DGC (consolidated action) **[PROPOSED] BRIEF *AMICUS CURIAE* OF ARIZONA GOVERNOR JANICE K. BREWER IN SUPPORT OF CITY OF GLENDALE**

[PROPOSED] BRIEF *AMICUS CURIAE* OF ARIZONA GOVERNOR JANICE K. BREWER IN SUPPORT OF PLAINTIFF CITY OF GLENDALE

Arizona Governor Janice K. Brewer respectfully submits this brief *amicus curiae* in support of plaintiff City of Glendale's motion for summary judgment.

INTEREST OF *AMICUS*

As Arizona's Chief Executive Officer, the Governor Brewer is charged under the Arizona Constitution with assuring that our laws are faithfully executed. Ariz. Const. art. 5, § 4. This includes the laws that balance the important sovereign interests of the State of Arizona and its federally recognized Indian tribes. This case involves an attempt by the Tohono O'odham Nation ("Tohono"), to establish a reservation in this State, which is far from its land base and near the center of the State's largest metropolitan area for the sole purpose of opening what will be one of the largest casinos in the State. For the reasons set forth in this brief, Governor Brewer concurs with arguments raised by the City of Glendale, which challenge the legality of the land acquisition.

If the proposed trust acquisition goes forward, the effect will be twofold: First, the new reservation will fall under the sovereign control of the Tohono, and the State accordingly will lose most incidents of sovereignty—including the power to control land use and enforce many laws—over land located squarely within a major urban area. Second, any resulting casino would violate the commitment made by the Tohono to the Arizona voters in 2002, when those voters approved Proposition 202 on the belief that it constituted a compromise that would keep new casinos out of their neighborhoods.

Both of these effects are of paramount concern to Governor Brewer. As Chief Executive of Arizona, the Governor has the responsibility to safeguard the State's territorial integrity and its prerogative to assert sovereign control over all of its lands. That integrity and control will be undermined if the federal government is permitted to do what it seeks to do here. In addition, Governor Brewer has an abiding interest in ensuring that federal law is not interpreted to authorize an Indian tribe to disregard a carefully crafted agreement like Proposition 202, create a satellite reservation far from its population base, and use it to conduct gaming near the middle of the State's largest metropolitan area. Such an interpretation could have grievous implications for relations between tribes and the broader community, here and across the nation.

ARGUMENT

I. THE PARCEL AT ISSUE IS INELIGIBLE FOR TRUST ACQUISITION UNDER FEDERAL LAW.

Governor Brewer joins the arguments advanced by the City of Glendale that the proposed trust acquisition is forbidden by the terms of the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) (the "Gila Bend Act" or "Act"). Indeed, the Governor agrees that the acquisition violates the Act in at least three respects. *First*, the parcel at issue is fully enclosed by Glendale's corporate limits, and it accordingly is located "within the corporate limits of any city or town." Act § 6(d). Congress did not intend to authorize a tribe to create a reservation across the state from its population base, and in the middle of the State's largest metropolitan area, solely to

run a casino. The limitations embodied in Section 6(d) of the Gila Bend Act, including the "city or town" limitation, were designed to prohibit such an outcome.

Second, Governor Brewer agrees that the Department of the Interior ("the Department") was required to, and did not, determine whether the proposed trust acquisition complies with the 9,880-acre limit imposed by Section 6(c) of the Gila Bend Act. It is fundamental that "[a]n agency may not ignore factors Congress explicitly required be taken into account." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007) (citation omitted). Here the agency did just that. And its failure to inquire about the Tohono's compliance with Section 6(c) is particularly troubling because evidence put forward by the Gila River Indian Community (GRIC) strongly suggests that the parcel at issue is *not* eligible under Section 6(c), because the Tohono previously acquired some 16,000 acres using Gila Bend Act funds. The Department's decision at the very least should be vacated and remanded so that it may analyze compliance with Section 6(c) in the first instance.

Third, Governor Brewer agrees that the Department acted arbitrarily and capriciously in failing to determine whether the parcel qualifies for gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* The Department's regulations and practices provide that when a tribe proposes a trust acquisition for purposes of gaming, the Department's gaming-eligibility decision must be made *at the time* it decides whether to take the land into trust, not at some later date. That is sensible, precisely because once the land is in trust, parties opposed to gaming may lack a forum to

fight the tribe's gaming plans. Under the Administrative Procedure Act, the Department must be held to its usual standards.

II. THE PROPOSED TRUST ACQUISITION VIOLATES THE TENTH AMENDMENT AND THE INDIAN COMMERCE CLAUSE.

Governor Brewer agrees with the City of Glendale that the proposed trust acquisition violates the Tenth Amendment, and the Indian Commerce Clause, by purporting to denigrate Arizona's sovereign control over its land without its consent. Although Congress may create Indian reservations, it goes too far when it chooses particular state land for a new reservation and disregards the objections of the State and municipality where the land is located. As Glendale correctly observes, "'[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply,'" *Bryan v. Itasca Cnty*., 426 U.S. 373, 376 n.2 (1976), and tribal sovereignty principles "specifically prohibit[] state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning." *Crow Tribe of Indians v. State of Mont*., 650 F.2d 1104, 1110 (9th Cir. 1981) (citations omitted).

A major effect of divesting the state of its sovereign control would be making it generally unable to enforce its criminal laws. Within Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians, *see New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), and victimless crimes by non-Indians. Instead, responsibility for criminal law enforcement rests with the tribes and the federal government. *See* 18 U.S.C. §§ 13, 1152 and 1153. Consequently, the state would be unable to provide emergency

responses to criminal activity without the consent of the tribe. Moreover, the state would be prohibited from exercising zoning control over the property and structures to protect the interests of the residential communities and schools that surround the land. *Crow Tribe of Indians*, 650 F.2d at 1110. If the federal government desires to take an action with such a detrimental affect on a State's sovereignty, it must first obtain the State's consent.

On the contrary, Governor Brewer has publicly expressed her objection to this trust acquisition on two occasions and the City of Glendale, among others, have done the same. To negate State control over its own land under these circumstances undermines the Constitution's structural guarantee of state sovereignty.

III. THE TOHONO'S PROPOSED CASINO VIOLATES COMMITMENTS THE TRIBE MADE TO ARIZONA VOTERS.

Finally, it is of substantial concern to Governor Brewer that the Tohono's effort to open a large casino in Glendale directly contradicts a commitment the tribe made to Arizona voters in 2002. State officials and all the Indian tribes of Arizona reached a compromise agreement that would carefully balance tribes' interests while also limiting gaming. That compromise appeared on the ballot in 2002 as Proposition 202. Seventeen tribes, including the Tohono, supported the measure, and they assured the public that voting "yes" would keep gaming out of cities. Voters approved Proposition 202 in November 2002. Within months thereafter, the Tohono had purchased the land they now seek to use to open a large casino right in the middle of Arizona's largest metropolitan area.

Governor Brewer wrote to Tohono Chairman Ned Norris this past January and noted that "Proposition 202 . . . assured voters that if they supported the balance contained within it that all casino style gambling would be limited to existing tribal communities and would not become part of off-reservation neighborhoods." AR1650. Governor Brewer expressed in that letter that she "do[es] not believe the voters ever anticipated that gaming in this state would be anywhere other than on the tribal lands that existed at the time of Proposition 202." *Id.* The proposed trust acquisition violates the law, creates a dangerous precedent, and threatens the balance of power between tribes. Moreover, if the Tohono proceeds with its casino as planned, it will also betray the commitment it made to this State's citizens. The Department's decision to approve the acquisition must therefore be reversed.

CONCLUSION

For the reasons above, the City of Glendale's motion for summary judgment should be granted.

Respectfully submitted,

/s/ Joseph Kanefield

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2010, I electronically transmitted the attached [Proposed] Brief *Amicus Curiae* to the Clerk's Office using the CM/ECF system for filing and service to counsel of record in these consolidated proceedings.

/s/ Joseph Kanefield

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Joseph Kanefield